United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 17,742

SCOTT C. HARSHAW,

Appellant

v.

DR LEROY BURNEY, et al.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

A. J. SPERO
1725 Eye Street, N. W.
Washington, D. C.

Attorney for Appellant

QUESTION PRESENTED

Does mere statement to appellant that his "withdrawal from the foreign service and termination were proper actions," after the Appeals Board had recommended only that appellant "be withdrawn from foreign service . . .", but, "that this finding should not disqualify Mr. Harshaw (appellant) from employment with the U. S. Government in the United States", constitute a finding of such cause as would reflect upon appellant's suitability for re-employment, a prerequisite for refusing to re-employ appellant.

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UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia, dated December 18, 1962, granting the defendant's motion for a summary judgment and denying plaintiff's cross-motion for a summary judgment.

The jurisdiction of this Court is invoked under the provisions of Section 1291, Title 28, United States Code.

STATEMENT OF CASE

Appellant on or about July 20, 1952 was a permanent employee of the United States Government holding the position of Public Building Superintendant, GS-9, Public Health Service. On the 21st day of July, 1952, he accepted an appointment abroad as an employee of a division of the Department of State, which eventually became the International Cooperation Administration.

Appellant retained, however, all his re-employment rights in his former agency.

On March 25, 1955, appellant was notified that it was intended to separate him from his employment thirty days after receipt of the notice listing the three charges which were to be the basis for his dismissal. Appellant replied to the notice and when notified that his separation would be nonetheless effected, appellant appealed to the head of the agency. The Director of the I.C.A. appointed an Appeals Board of three persons and requested them to submit their joint recommendation.

On September 26, 1955, the Director informed appellant that "after due consideration to the recommendations" of the Appeal Board it was his decision that appellant's "withdrawal from the foreign service and termination were proper actions" and that his separation would be effective 30 days later.

Appellant pursued his remedies through the Civil Service Commission and the Courts of the District of Columbia. This

Court upheld the "withdrawal . . . and termination" in an opinion decided February 26, 1959.

Appellant during the pendancy of the above-noted case and thereafter attempted to assert his re-employment rights. But the Public Health Service refused his request for the reason that he had been discharged for cause reflecting on his suitability for re-employment.

Appellant appealed this decision to the Civil Service Commission and when the denial of re-employment was upheld filed this action in the United States District Court for the District of Columbia.

Both parties moved for summary judgement and it is from the order of the District Court granting appellees' cross motion for summary judgement and denying appellant's motion for summary judgement that appellant has appealed.

STATUTES AND REGULATIONS INVOLVED

5 CFR 1955 Supp. 10.105, 19 FR8616, December 16, 1954, formerly 8.296, 17 FR344, January 11, 1952, providing re-employment if "involuntarily separated without cause such as would reflect on his suitability for re-employment".

STATEMENT OF POINTS

The Court below erred:

1. In finding that the transfer of the appellant from his position with the International Cooperation Administration abroad back to the United States was a "separation for cause."

2. In finding that the separation was for such cause as would reflect on appellant's suitability for re-employment.

3. In failing to order the re-employment of the appellant.

4. In denying appellant's motion for summary judgement.

5. In granting appellees' motion for summary judgement.

ARGUMENT

The regulation involved requires that three facts be established in order to deny an employee the right to assert his re-employment rights. They are:

1. Involuntary separation

2. For (such) cause

3. As to reflect upon his suitability for re-employment.

It is admitted that the appellant was involuntarily separated.

On what basis was that termination accomplished? Two steps occurred that are material here. An Appeals Board recommended only that appellant be withdrawn from foreign service and should not be disqualified from service in the United States.

The Director of the I.C.A. to whom this recommendation was made then notified appellant that his "withdrawal from the foreign service and termination were proper actions".

Is there any statement of cause in either of these actions? On the contrary, is not the conclusion readily reached that only foreign service was involved and not domestic service? And if that is true, is there any cause whatsoever?

The first mention of cause occurs in a letter from the Personnel Officer of the Public Health Service in response to appellant's attempted assertion of his re-employment rights. (Appendix page 18.)

Appellant's request is denied because the Public Health Service had been informed that appellant had been discharged for cause.

Who made that determination and how it was made does not appear. And it is argued here that an evaluation of an employee's record to arrive at a finding of such gravity should not be made without affording the employee an opportunity to be heard. The proper procedure would have been to submit the record to the Public Health Service with the right granted to the employee to be heard with respect to whether or not his discharge precluded his re-employment.

But further, the requirement is not merely discharge for "cause." But such cause as would reflect upon his suitability for re-employment.

Assuming that appellant was discharged for cause, does this deny the possibility that the cause would not reflect upon

his suitability for re-employment? Is there any case more clear cut than the instant case of a discharge which does not reflect upon suitability for re-employment?

The fact that cannot be avoided is the positive recommendation that appellant should not be disqualified from the domestic Civil Service and that nowhere is there a contrary statement, finding or recommendation.

The statement of the Director of the I.C.A. in fact endorses the Appeals Board's recommendations by declaring them to be "proper actions".

Therefore, since appellant was not involuntarily separated for such cause as would reflect upon suitability for re-employment, the denial of his re-employment was error and the judgement of the District Court upholding such denial was error.

Respectfully submitted,

A. J. Spero
Attorney for Appellant

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT C. HARSHAW
654 Girard Street, N. W.
Washington, D. C.

Plaintiff

v.

DR. LEROY BURNEY, Surgeon General
United States Public Health Service
a constituent agency of the
Department of Health, Education
and Welfare
330 Independence Avenue, S. W.
Washington, D. C.

and

ARTHUR V. FLEMING, Secretary
Department of Health, Education
and Welfare
330 Independence Avenue, S. W.
Washington, D. C.

and

ROGER JONES,
Chairman,
United States Civil Service
Commission
F Street at 8th Street, N. W.
Washington, D. C.

and

FREDERICK LAWTON, Commissioner
and Member
United States Civil Service Commission
F Street and 8th Street, N. W.
Washington, D. C.

and

BARBARA GUNDERSON, Commissioner and
Member of United States Civil
Service Commission
F Street at 8th Street, N. W.
Washington, D. C.

Defendants

Civil Action No. 422-60

C-O-M-P-L-A-I-N-T

1. Plaintiff is an adult citizen of the United States and a resident of the District of Columbia. This is a complaint for equitable relief and for declaratory judgment arising under the laws of the United States. Jurisdiction of this Court is invoked under Title 28, Sections 1331 and 2201 and District of Columbia Code, Sections 11-305, 306.

2. Plaintiff, on or about July 20, 1952, was employed by the United States Public Health Service of the Federal Security Agency as Superintendent of Buildings and Grounds at Freemans Hospital. On that date he was appointed by the Department of State as a Foreign Service Officer at the United States of America Operations Mission, Monrovia, Liberia, as maintenance engineer. At the time of plaintiff's appointment to the position with the Department of State as aforesaid, he was granted re-employment rights with and in the then existing Federal Security Agency, which said Agency was thereafter incorporated in the Department of Health, Education and Welfare.

3. While employed with the Foreign Service Office of the Department of State, as a maintenance engineer, plaintiff was notified to return to the United States for termination. Plaintiff asked for an Appeal Hearing Board at his post in Liberia. The notice was then changed authorizing his return to the United States on leave and return to his post. Thereafter he received further notice to return again to the United

States for consultation and then plaintiff, on March 25, 1955, received written notice that it was proposed that he be separated from employment 30 days thereafter. A copy of said notice is appended hereto as Exhibit A.

4. Plaintiff replied to said notice and thereafter appealed the action of the Agency when notified that his reply was considered inadequate to change the decision. Prior to the holding of the hearing on Appeal, the agency employing the plaintiff was transferred to the International Cooperation Administration, hereinafter called the I.C.A. On September 26, 1955, plaintiff was notified that plaintiff's "withdrawal from foreign service and terminations were proper actions and that plaintiff would be separated thirty days thereafter". This decision was based upon the findings of a panel of three (3) employees of the I.C.A. who held a hearing for the purpose of determining whether or not the charges filed against the employee were proper. The said hearing was held and the appeal board on September 9, 1955, recommended that "Mr. Harshaw be withdrawn from Foreign Service in I.C.A. Since the bases for this decision are facts and considerations peculiar to service overseas in a representative capacity for the United States Government, the Board feels that this finding should not disqualify Mr. Harshaw from employment in the United States Government in the United States." It was further

recommended that plaintiff, Mr. Harshaw, be paid until the time of the order of the Director of the I.C.A. plus 30 days without pay in order "to find employment with the United States Government in the United States or in a private industry".

5. Plaintiff appealed this decision through the regular channels of the Agency and the Civil Service Commission and after exhausting his administrative remedies to no avail, filed a complaint in the United States District Court for the District of Columbia alleging that the order and action taken thereon were improper and in violation of the rules and regulations of the Agency, the Civil Service Commission and the laws and regulations of the United States. The United States District Court for the District of Columbia upheld the action of the Agency.

6. Plaintiff, by letter dated November 19, 1955, then requested re-employment in the Public Health Service, Department of Health, Education and Welfare. Plaintiff was informed by Paul M. Camp, Chief, Division of Personnel of the Department of Health, Education and Welfare, that since his removal from his last Federal position was for cause that he therefore did not comply with the criteria for re-employment in the Public Health Service.

7. On January 1, 1956, plaintiff appealed this denial of his re-employment rights to the Appeals Examining Office of the United States Civil Service Commission. On February 7, 1956, after being notified that he had filed his appeal with an improper division of the Civil Service Commission, he then submitted his appeal to the United States Civil Service

Commission, Board of Appeals and Review.

8. On March 13, 1956, the Board of Appeals and Review upheld the refusal of the Public Health Service of the Department of Health, Education and Welfare, to effect the plaintiff's re-employment. On July 7, 1957, plaintiff appealed this action to the Board of Appeals and Review directly to the Commissioners of the United States Civil Service Commission. On October 21, 1959, plaintiff was notified by John E. Blann, Chairman of the Board of Appeals and Review, Civil Service Commission, that his appeal to the Commissioners was denied and that this action exhausted his administrative remedies within the Commission.

9. Plaintiff contends that his separation from the I.C.A., although involuntary, was not for cause and that therefore the Public Health Service, in refusing him re-employment rights deprived plaintiff of his said rights. That the said action was in violation of the rules and regulations of the Public Health Service, Department of Health, Education and Welfare, of the regulations of the United States Civil Service Commission and of the United States Code designed to protect employees of the Civil Service.

WHEREFORE, the premises considered, plaintiff prays this Honorable Court:

1. That the process of this Court issue directing and commanding each of the above named Defendants to appear and answer this Bill of Complaint.

2. That Defendants be required to produce all evidence upon which the plaintiff's removal as a Civil Service employee was based.

3. That declaratory judgment be entered in this cause adjudicating and declaring that defendants' refusal permitting the plaintiff to exercise his re-employment rights was illegal and unlawful.

4. That the Court order the defendants, as part of the declaratory judgment to restore plaintiff to his position as of the date that plaintiff made the formal request for such re-employment and to award to the plaintiff all of the rights, benefits and privileges which may or might have accrued, including payment of his salary from the date of plaintiff's request for re-employment.

5. And for each such other and further relief as to this Honorable Court may seem just and proper.

/s/ A. J. Spero

A. J. SPERO
Attorney for Plaintiff
330 - Wyatt Building
Washington, D. C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT C. HARSHAW,	:	
Plaintiff	:	
v.	:	Civil Action No. 422-60
DR. LEROY BURNEY, Surgeon General ARTHUR V. FLEMING, Secretary Department of Health, Education and Welfare	:	
ROGER JONES, Chairman, United States Civil Service Commission	:	
FREDERICK LAWTON, Commissioner and Member, United States Civil Service Commission	:	
BARBARA GUNDERSON, Commissioner and Member, United States Civil Service Commission,	:	
Defendants	:	

A N S W E R

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering the numbered allegations of the complaint specifically defendants set forth:

1. Defendants are not required to answer the allegations of paragraph 1.

2. Defendants deny that plaintiff was a Foreign Service Officer. Defendants aver that plaintiff was a Foreign Service staff employee with reemployment rights in the United States Public Health Service. The remaining allegations of paragraph 2 are admitted.

3. Defendants deny that plaintiff was employed with the "Foreign Service Office" averring that plaintiff was under the jurisdiction of the Division of Foreign Service Personnel, Department of State. Defendants are without knowledge or information sufficient to form a belief as to plaintiff's request for an Appeal Hearing Board. The remaining allegations of paragraph 3 are admitted.

4. Defendants admit the allegations of paragraph 4.

5. Defendants admit the allegations of paragraph 5.

6. Defendants admit the allegations of paragraph 6.

7. Defendants deny the allegation that plaintiff appealed on January 1, 1956, averring that plaintiff's letter of appeal is dated January 4, 1956. Defendants further deny plaintiff was notified that he filed his appeal with an improper division of the Civil Service Commission. Defendants admit that on February 7, 1956, he submitted an appeal but aver that the appeal was addressed to "The Commissioners, U. S. Civil Service Commission."

8. Defendants admit the allegations of sentence 1 of paragraph 8. Defendants deny the allegations of sentences 2

and 3 of paragraph 8 except insofar as defendants admit that John E. Blann wrote a letter to plaintiff dated October 21, 1959.

9. Defendants deny the allegations of paragraph 9.

Third Defense

This action is barred by laches.

Fourth Defense

This action is barred by the decision of this Court in Harshaw v. Hollister, Civil Action No. 2408-56.

/s/ Oliver Gasch
OLIVER GASCH
United States Attorney

/s/ Edward P. Troxell
EDWARD P. TROXELL, Principal
Assistant United States Attorney

/s/ John F. Doyle
JOHN F. DOYLE
Assistant United States Attorney

/s/ Sylvia A. Bacon
SYLVIA A. BACON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Answer was made upon plaintiff by mailing a copy thereof to his attorney, A. J. Spero, Esquire, 330 - Wyatt Building, Washington 5, D. C., this 18th day of April, 1960.

/s/ Sylvia A. Bacon
SYLVIA A. BACON
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

SCOTT C. HARSHAW	)	
Plaintiff	)	
v.	)	Civil Action No. 422-60
DR. LEROY BURNEY, ET AL.	)	
Defendant	)	

MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff by his Attorney, A. J. Spero, and respectfully moves for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure for the reason that there exists no genuine issue of material fact and that the Plaintiff is entitled to a judgment as a matter of law.

In support of this Motion Plaintiff relies upon the pleadings filed herein, the exhibits attached thereto, the transcript of the proceedings before the International Cooperation Administration, the attached affidavit of Plaintiff, with annexed exhibits, and the points and authorities filed herewith.

/s/ A. J. Spero
A. J. Spero
Attorney for Plaintiff
330 Wyatt Building
Washington, D. C.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was delivered by hand this 13th day of April 1962 to the Office of the United States Attorney for the District of Columbia, located in the United States Courthouse, 3rd and Pennsylvania, N. W., Washington, D. C.

/s/ A. J. Spero
A. J. Spero

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT C. HARSHAW

PLAINTIFF

v. CIVIL ACTION NO. 422-60

DR. LEROY BURNEY, ET AL

DEFENDANTS

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 9, the plaintiff sets forth the following facts as to which there is no genuine issue:

1. Plaintiff transferred from the Public Health Service (Freedman's Hospital) to the predecessor of the International Cooperation Administration in July of 1952 with reemployment rights.

2. The applicable reemployment regulations is 5 CFR 1955 Supp. 10.105 19 FR 8616 Dec. 16, 1954 formerly 8.206, 17 FR 344 Jan. 11, 1952 providing reemployment if "involuntarily separated without cause such as would reflect on his suitability for reemployment.

3. Plaintiff was involuntarily separated from the International Cooperation Administration.

4. This separation followed a hearing before a panel which said panel made findings and recommendations. Ex. 1.

5. Following the report of the panel, the Director of the International Cooperation Administration notified the plaintiff of his separation from the service. Plaintiff's Exhibit 2.

6. Plaintiff applied for his position with the Public Health Service in accordance with the reemployment rights guaranteed to him at the time he left the Agency.

7. The Director of the Personnel Division of the Federal Security Agency denied his request. Plaintiff's Exhibit 33.

8. Plaintiff thereafter appealed this denial to the Civil Service Commission which refused to order plaintiff's reemployment.

9. On February 11, 1960 suit was filed.

/s/ Scott C. Harshaw
SCOTT C. HARSHAW, PLAINTIFF

/s/ A. J. Spero
A. J. SPERO ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

A copy of the aforegoing Statement of Material of Facts was delivered to the office of the United States Attorney, United States District Court House, Third and Pennsylvania Avenue, N. W., Washington, D. C., by hand, this 29th day of October, 1962.

/s/ Abe Spero
Abe Spero

PLAINTIFF'S EXHIBIT 1

INTERNATIONAL COOPERATION ADMINISTRATION
Washington 25, D. C.

September 9, 1955

MEMORANDUM FOR: Mr. John B. Hollister
Director, ICA

FROM: Appeal Board

SUBJECT: Findings and Recommendations on Appeal Taken by Mr. Scott C. Harshaw

The Appeal Board to hear evidence relating to the appeal taken by Mr. Scott C. Harshaw met from 1000 to 1730 on 30 August, with a luncheon recess. Mr. Harshaw was represented by Mr. J. C. Waddy and Mr. W. C. Gardner. Mr. D. Lane sat as legal advisor for the Board.

Findings on specific charges:

(a) Charge 1. Mr. Harshaw while assigned to USOM/L did not conform to the published guides and policies for the conduct

of American employees. He was familiar with them but chose to place his own interpretation on them. He showed poor judgment in the action he took in his diamond business inquiries, and his reasons for these as given are not convincing. It is difficult to accept his willingness to pay $25.00 for a diamond export license merely to find out if he could obtain one. His association with Julius Belcher, a diamond dealer in Liberia, was not satisfactorily explained and is questionable. His visit to a New York diamond dealer (Rough Diamond Company, Inc.) at a time when he was in the official status of a U. S. Government employee was not satisfactorily explained. There is, however, no evidence to show that Mr. Harshaw actually engaged in diamond or other business, and by his activities mentioned here created a situation that might have been embarrassing to the U. S. Government.

The official status of Mr. Harshaw within the USOM/L during the time generally covered by the diamond inquiries was indefinite. He had been told in July 1954, because of internal friction in USOM/L involving himself, that he was not to be retained there. That was revoked in August 1954 and he was granted home leave with orders to return to his post in Liberia. During his home leave he again heard rumors that his retention was questionable, although he did nothing to determine his status. Upon his return to Liberia in November 1954, he was

told he was to continue in service. In December 1954 he was summarily ordered home. Under these conditions it is not unexpected that he would attempt to find other fields of employment, even outside Government service. It is surprising, however, that he would choose diamond trading, in view of his education and previous training even within his expressed desire to continue to live in Liberia.

Mr. Harshaw was tactless in his relations with his administrative superiors in USOM/L. This created a situation outside of his technical competence where his usefulness to the Mission became questionable. This fact, when taken in connection with his known diamond inquiries, his association with Julius Belcher, and his failure to declare the small diamonds he was known to have brought from Liberia without payment of export duties, led to his detachment from USOM/L and the charges against him.

(b) Charge 2. There was no willful violation of existing regulations or directions involved in his bringing four small diamonds into the U. S. The stones in question, as stated by the U. S. Customs in New York, are of little value ($50.00). They are in the nature of curios or trinkets, and it is not unusual that in this instance no export duty was paid when Mr. Harshaw departed from Liberia in each instance when he took them out of that country. He should have listed them on his customs

declaration upon arrival. His failure to do so, however, is understandable.

(c) Charge 3. There was no willful violation by Mr. Harshaw of known directives and instructions. There are mitigating circumstances incident to his immediate detachment and the refusal to grant delay in his departure, which he requested for the purpose of disposing items in question, in accordance with requirements.

Summary of Findings:

Charges 2 and 3. There is not sufficient evidence to support Mr. Harshaw's separation.

Charge 1. There is no direct evidence of transactions by Mr. Harshaw in the diamond business. It is clear, however, that he maintained an active interest in this business (obtaining an export license, his association and communications with diamond dealers) and thereby created a situation that might have embarrassed the U. S. Government of which he was an employee.

RECOMMENDATIONS:

That Mr. Harshaw be withdrawn from foreign service in ICA. Since the basis for this decision are facts and considerations peculiar to service overseas in a representative capacity for the U. S. Government, the Board feels that this finding

should not disqualify Mr. Harshaw from employment with the U. S. Government in the United States.

Because of the delays in the hearings of the appeal, Mr. Harshaw should not be required to bear the burden of loss of pay, and it is recommended that he be given back pay until the time of your order, and in addition thirty days leave without pay from the day of your order to find employment with the U. S. Government in the United States or in private industry.

Admiral W. S. DeLany
Deputy Director
Office of Mutual Defense Assistance Control

Mr. Charles A. Richards
Director, Office of Small Business

Mr. Arthur G. Syran
Director, Office of Transportation

PLAINTIFF'S EXHIBIT 2

"INTERNATIONAL COOPERATION ADMINISTRATION
OFFICE OF THE DIRECTOR
Washington 25, D. C.

Sep. 26 1955

"Mr. Scott C. Harshaw
654 Girard Street, N.W.
Apt. No. 214
Washington 1, D. C.

"Dear Mr. Harshaw:

"This will serve to advise you of my decision respecting your separation from this Agency after due consideration to

the recommendations made by the Appeal Board in your case.

"It is my decision that your withdrawal from the foreign service and termination were proper actions and that your separation from the service of this Agency should be complete effective thirty days from the date hereof, this thirty day period to be an extension of leave without pay.

"Yours very sincerely,

/s/ John B. Hollister".

PLAINTIFF'S EXHIBIT 3

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
Washington 25, D. C.

In Replying, Address The
Public Health Service

Refer To: P-RU

DEC 1955

Mr. Scott C. Harshaw
654 Girard Street, N. W.
Washington 1, D. C.

Dear Mr. Harshaw:

This is in reference to your letter of November 19, 1955 in which you request reemployment to the position in the Public Health Service, Department of Health, Education and Welfare, from which you were transferred to the State Department on July 20, 1952.

The conditions under which an employee with reemployment rights may exercise such rights are when:

(1) He is involuntarily separated without cause such as would reflect on his suitability for reemployment; or

(2) He is reduced to a grade or level below that held at the time of separation with reemployment rights.

We have been informed that your separation from the International Cooperation Administration was for cause, based on charges which were outlined to you in a letter dated March 25, 1955. In view of the fact that you were removed for cause from your last Federal position, you do not meet the criteria for exercising your reemployment rights. Therefore, we are not restoring you to duty in the Public Health Service.

Sincerely yours,

/s/ Paul M. Camp
Paul M. Camp, Chief
Division of Personnel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT C. HARSHAW,	:	
Plaintiff,	:	
v.	:	Civil Action No. 422-60
DR. LEROY BURNEY, et al.,	:	
Defendants.	:	

O R D E R

Upon consideration of the cross-motions for summary judgment filed herein and the Court having heard oral argument and having considered the pleadings and it appearing that there is no genuine issue of fact and that defendants are entitled to judgment as a matter of law, it is by the Court this _____ day of December, 1962

ORDERED that plaintiff's motion for summary judgment be and the same hereby is denied and it is

FURTHER ORDERED that defendants' motion for summary judgment be and the same hereby is granted and it is

FURTHER ORDERED that judgment be and the same hereby is entered for defendants dismissing the complaint with prejudice and with costs.

_____
Chief Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing proposed Order has been made upon plaintiff by mailing a copy thereof to his attorney, A. J. Spero, Esq., 330 Wyatt Building, Washington, D. C., this 17th day of December, 1962.

/s/ Sylvia A. Bacon
SYLVIA A. BACON
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT C. HARSHAW	)	
Plaintiff	)	
v.	)	Civil Action No. 422-60
DR. LEROY BURNEY, et al.	)	
Defendants	)	

CROSS MOTION FOR SUMMARY JUDGMENT

AND

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Come now the defendants by and through their attorney, the United States Attorney for the District of Columbia and pursuant to Rule 56 Federal Rules of Civil Procedure move this Court for an order granting summary judgment for defendants for the following reasons:

1. The complaint is barred by laches.

2. The issues were, or should have been, litigated in Harshaw v. Hollister, CA 2408-56.

3. Plaintiff is not entitled to reemployment under the applicable regulation.

   a. Plaintiff was involuntarily separated with cause which reflects on his suitability for reemployment.

   b. Determination of "cause" is within agency discretion.

4. There is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

Defendants also oppose plaintiff's motion for summary

judgment for the reason that it does not comply with Local Civil Rule 9 and for the further reason that plaintiff is not entitled to the relief which is demanded.

Incorporated herein and made a part hereof are Government Exhibit I, the affidavit of William H. Carr, Government Exhibit II, the certified record of the Department of Health Education and Welfare and Government Exhibit III, the certified records of the Civil Service Commission.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan
CHARLES T. DUNCAN, PRINCIPAL
Assistant United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Sylvia A. Bacon
SYLVIA A. BACON
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, together with statement of material facts, memorandum of points and authorities in support thereof and Government Exhibits I, II and III has been made on plaintiff by mailing copies thereof to his attorney, A. J. Spero, Esquire, 330 Wyatt Building, Washington, D. C., on this 11th day of September, 1962.

/s/ Sylvia A. Bacon
SYLVIA A. BACON
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT C. HARSHAW	)	
Plaintiff,	)	
v.	)	Civil Action No. 422-60
DR. LEROY BURNEY, et al.	)	
Defendants.	)	

DEFENDANTS' STATEMENT OF MATERIAL FACTS

Pursuant to Local Civil Rule 9, the defendants set forth the following facts as to which there is no genuine issue:

1. Plaintiff transferred from the Public Health Service (Freedmen's Hospital) to the predecessor of the International Cooperation Administration in July of 1952 with reemployment rights. Government Exhibit II, Tab E.

2. The applicable reemployment regulation is 5 CFR 1955, Supp. 10.105, 19 FR 8616, December 16, 1954 formerly 8.206, 17 F.R. 344, January 11, 1952 providing reemployment if "involuntarily separated without cause such as would reflect on his suitability for reemployment."

3. Plaintiff was involuntarily separated from the International Cooperation Administration. The separation was litigated and affirmed. Harshaw v. Hollister, 105 U.S. App. D. C. 144, 265 F.3ed 128 (1959).

4. On November 19, 1955 plaintiff requested reemployment with the Department of Health Education and Welfare. Reemployment was denied on the ground that plaintiff had been involuntarily separated from government service with cause. Government Exhibit II, Tabs D and C.

5. On March 13, 1956 the denial of reemployment was affirmed by the United States Civil Service Commission. Government Exhibit III, Tab B.

6. Plaintiff "resubmitted" his request for reemployment on June 17, 1959 and it was denied. Government Exhibit II, Tabs B and A. The Civil Service Commission refused further review of denial of reemployment rights on October 21, 1959. Government Exhibit III, Tab A.

7. On February 11, 1960, suit was filed.

8. The defendants will suffer the detriment set forth in Government Exhibit I if required to reemploy plaintiff from "request for reemployment".

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

/s/ Charles T. Duncan
CHARLES T. DUNCAN, PRINCIPAL
Assistant United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Sylvia A. Bacon
SYLVIA A. BACON
Assistant United States Attorney

GOVERNMENT EXHIBIT I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT C. HARSHAW, :

PLAINTIFF :

v. : Civil Action No. 422-60

DR. LEROY BURNEY, et al., :

DEFENDDNTS :

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Before me, Florence D. Riordan, a Notary Public in and for the District of Columbia personally appeared William H. Carr, in the aforesaid District of Columbia known to me, who, being by me duly sworn, states on oath:

(1) That he is the Chief, Division of Civil Service Personnel, Office of Personnel of the Public Health Service, Department of Health, Education, and Welfare, which position he has held since May 1, 1961.

(2) That as Chief, Division of Civil Service Personnel, Office of Personnel of the Public Health Service, he is responsible for all matters pertaining to the hire and employment of civil service personnel for all positions for which that agency is authorized by law to employ eligible personnel.

(3) That he has in his custody the personnel records of the Public Health Service, including those records relating to Scott C. Harshaw and to vacant and unfilled positions within the agency.

(4) That he has examined and reviewed those records to determine the availability at the present time of a position at the same grade or level and in the same geographical area as the position which the plaintiff last held in this agency.

(5) That as a result of this examination and review, he has determined that there is no such position vacant and available for the plaintiff.

(6) That plaintiff is not eligible to replace any present employee of the Public Health Service.

(7) That defendants have received no service from plaintiff since April 25, 1955.

(8) That back pay to which plaintiff may be entitled and for which no service has been rendered increased by approximately $29,000 during the lapse of time between denial of reemployment and commencement of this action.

/s/ William H. Carr
WILLIAM H. CARR

SUBSCRIBED AND SWORN TO before me this 13 day of June, 1961.

/s/ Florence D. Riordan
Notary Public, District of Columbia

My Commission expires: December 14, 1964

GOVERNMENT EXHIBIT II

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
WASHINGTON

June 30, 1959

Mr. Soctt C. Harshaw

614 Girard Street, N. W.

Washington 1, D. C.

Dear Mr. Harshaw:

We have reviewed your request of June 17, 1959, for reconsideration of your reemployment right to the position formerly held by you at Freedmen's Hospital.

The decision made in December of 1955 that you did not meet the criteria for reemployment in the Public Health Service was based on your removal for cause from your last Federal position. The recommendation of the Appeal Board that heard your case does not alter this fact. Therefore, there is no change in our decision given you in letter of December 20, 1955.

Sincerely yours,

/s/ Paul M. Camp

Chief, Division of Personnel

cc: Freedmen Hospital

614 Girard Street, N. W.

Washington 1, D. C.

17 June 1959

Mr. Paul M. Camp, Chief

Division of Personnel

Health, Education, and Welfare

Public Health Service

Washington 25, D. C.

Dear Mr. Camp:

I wish to resubmit my request for reemployment to the position from which I was transferred with reemployment rights 28 July 1952. I am enclosing a copy of the recommendations made by the Appeal Board that sat on my case in the International Cooperation Administration. When I wrote you the original letter, I was not aware of these recommendations. The underscorings of paragraph 1 in the recommendations are mine. Enclosed you will also find recommendations given me by the heads of the divisions that I was supporting while in Africa.

Your consideration and response will be appreciated.

Very truly yours,

/s/ Scott C. Harshaw

Scott C. Harshaw

Enclosures 2:

1 - ICA Memorandum (3 pages)

2 - Recommendations (3)

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

March 13, 1956

Mr. Scott C. Harshaw

Apartment 214

654 Girard Street, N. W.

Washington 1, D. C.

Dear Mr. Harshaw:

This is in further reference to your letter of February 7, 1956, appealing the decision of the Appeals Examining Office that it was unable to adjudicate an appeal from denial of reemployment rights after your separation from the International Cooperation Administration, following overseas service.

A review of all the representations made by you and consideration of all the evidence contained in the file concerning your case shows that you do not meet the requirements of Civil Service Regulation 10.105, formerly 8.206, and that you are not entitled to reemployment with the Public Health Service, Department of Health Education and Welfare. The Chief, Division of Personnel of the Health Service was correct in informing you that your separation from the International Cooperation Administration for cause constituted sufficient basis for denial of your request for reemployment. Section 10.105 establishes as one of the conditions under which employees may apply for reemployment: "(1) He is involuntarily separated without cause such as would reflect on his suitability for reemployment--".

In the basence of any evidence that you meet the conditions necessary for the exercise of reemployment rights, the Board is unable to direct an action different from that taken in your case by the Public Health Service.

Sincerely yours,

John E. Blann, Chairman
Board of Appeals and Review

For the Commissioners:

cc: Director of Personnel
Department of Health, Education
and Welfare
Washington 25, D. C.

cc: Appeals Examining Office

cc: Honorable Estes Kefauver, USS

FEDERAL SECURITY AGENCY

Washington

December 20, 1955

P-RU

Mr. Scott C. Harshaw

654 Girard Street, N. W.

Washington 1, D. C.

Dear Mr. Harshaw:

This is in reference to your letter of November 19, 1955 in which you request reemployment to the position in the Public Health Service, Department of Health, Education and Welfare, from which you were transferred to the State Department on July 20, 1952.

The conditions under which an employee with reemployment rights may exercise such rights are when:

(1) He is involuntarily separated without cause such as would reflect on his suitability for reemployment; or

(2) He is reduced to a grade or level below that held at the time of separation with reemployment rights.

We have been informed that your separation from the International Cooperation Administration was for cause, based on charges which were outlined to you in a letter dated March 25, 1955. In view of the fact that you were removed for cause from your last Federal position, you do not meet the criteria for exercising your reemployment rights. Therefore, we are not restoring you to duty in the Public Health Service.

Sincerely yours,

/s/ Paul M. Camp

Paul M. Camp, Chief

Division of Personnel

AEGramling/rk

cc: Mr. Welters

Freedmen's Hospital

November 19, 1955

Mr. Paul Camp

Personnel Chief

Public Health Service

Department of Health, Education and Welfare

Washington 25, D. C.

Dear Mr. Camp:

This is a request for re-employment with the Department of Health, Education and Welfare. I was transferred to the State Department, Foreign Service, July 20, 1952. I completed one over seas tour of duty and was on my second when I was recalled to the States and involuntarily separated as of October 26, 1955. (Enclosed you will find copy of Standard Form 50, dated 7/28/52)

Your early consideration will be greatly appreciated.

Very truly yours,

/s/ Scott C. Harshaw

Scott C. Harshaw

SCH/jch

GOVERNMENT EXHIBIT III

I, Mary V. Wenzel, Executive Assistant to the Commissioners, United States Civil Service Commission, certify that the documents attached hereto, relate to the case of SCOTT C. HARSHAW, and are true copies of official documents under my custody and control.

Mary V. Wenzel

April 4, 1960

Washington, D. C.

BAR:JEB:rr

October 21, 1959

Mr. Scott C. Harshaw

654 Girard Street, N. W.

Apartment 214

Washington 1, D. C.

Dear Mr. Harshaw:

This refers to your letter of July 7, 1959, addressed to the Commissioners, appealing the denial of your request for reemployment by the Department of Health, Education and Welfare, and to your subsequent letter of September 2, 1959.

Your appeal of this matter was presented to the Commission's Appeals Examining Office by letter of January 4, 1956 which held that the matter was not within its jurisdiction. Your further appeal of this matter was presented to the Commission's Board of Appeals and Review by letter of February 7, 1956. The Board accepted jurisdiction, adjudicated the matter, and found that you had been involuntarily separated for cause by the

International Cooperation Administration; hence, you failed to qualify for reemployment by the Public Health Service under the provision of Civil Service Regulations, Section 10.105 (formerly Section 8.206). The Board's decision, issued for the Commissioners on March 13, 1956, upheld the refusal of the Public Health Service to effect your reemployment after transfer. This decision exhausted your administrative remedies within the Commission.

It is noted that, in your letter of July 7, 1959, you state that, in refusing your reemployment, the Department of Health Education and Welfare (Public Health Service) failed to inform you of your right of appeal to the Commission from the agency's action. This contention is without effect since, as indicated above, you were not thereby deprived of the right of such appeal. The record establishes that you have received the full appellate rights to which you were entitled in the matter.

Sincerely yours,

/s/

John E. Glann, Chairman

Board of Appeals and Rev[illegible]ew

BAR:SJW;sbj

March 13, 1956

Mr. Scott C. Harshaw

Apartment 214

654 Girard Street, N. W.

Washington 1, D. C.

Dear Mr. Harshaw:

This is in further reference to your letter of February

7, 1956, appealing the decision of the Appeals Examining Office that it was unable to adjudicate an appeal from denial of reemployment rights after your separation from the International Cooperation Administration, following overseas service.

"A review of all the representations made by you and consideration of all the evidence contained in the file concerning your case shows that you do not meet the requirements of Civil Service Regulation 10.105, formerly 8.206, and that you are not entitled to reemployment with the Public Health Service, Department of Health Education and Welfare. The Chief, Division of Personnel of the Health Service was correct in informing you that your separation from the International Cooperation Administration for cause constituted sufficient basis for denial of your request for reemployment. Section 10.105 establishes as one of the conditions under which employees may apply for reemployment: "(1) He is involuntarily separated without cause such as would reflect on his suitability for reemployment--".

In the absence of any evidence that you meet the conditions necessary for the exercise of reemployment rights, the Board is unable to direct an action different from that taken in your case by the Public Health Service.

Sincerely yours,

John E. Blann, Chairman

Board of Appeals and Review

For the Commissioners:

cc: Director of Personnel
Department of Health, Education
and Welfare

Washington 25, D. C.

cc: Appeals Examining Office

cc: Honorable Estes Kefauver, USS

654 Girard Street, N. W.
Apartment 214
Washington, D. C.
January 4, 1956

Appeals Examining Office of the
United States Civil Service Commission
Washington 25, D. C.

Gentlemen:

This is an appeal from a denial of my re-employment rights by the Public Health Service, Department of Health, Education and Welfare.

I am a Civil Service career employee and have been such for more than thirteen years. On July 20, 1952, while I was employed by the Federal Security Agency in a Civil Service job as Superintendent of Buildings and Grounds at Freedmen's Hospital, Washington, D. C., I was appointed by the Department of State to a position with the Technical Cooperation Administration as Maintenance engineer, initial post, Monrovia, Liberia. I gave up my job at Freedmen's Hospital and entered upon my duties in Liberia. Later the functions and personnel of the Technical Cooperation Administration were transferred to the Foreign Operations Administration. When I was appointed to the position with the Technical Cooperation Administration I

was given re-employment rights with the Federal Security Agency. I was involuntarily separated from International Cooperation Administration effective October 26, 1955. By letter dated November 19, 1955, I requested re-employment in the Public Health Service, Department of Health, Education and Welfare. Under date of December 20, 1955, I was informed by Paul M. Camp, Chief, Division of Personnel, that since my removal from my last Federal position was for cause, I do not meet the criteria for exercising my re-employment rights and, therefore, I would not be restored to duty in the Public Health Service. I hereby appeal from that decision.

I contend: (1) that it is impossible to determine from the charges against me or the notice advising me of my separation the cause for which I was separated from International Cooperation Administration, and (2) whatever the cause might be, it does not reflect adversely on my suitability for re-employment with the Department of Health, Education and Welfare.

In support of my contentions I state the following: On or about December 20, 1954, I was given two days notice by my superiors in Monrovia that I was being returned to the United States for consultation and that I would be required to leave Liberia on December 22, 1954. I was also ordered to pack and secure all of my property before leaving. I arrived in the United States December 24, 1954, and thereafter discovered that I was under investigation concerning a number of charges against me. I was given no written list of the charges at that time but was required to make statements and submit to interrogation.

Approximately three months after my return to the United States I received a letter dated March 25, 1955, from R. E. Peterson, Director of Personnel, Foreign Operations Administration ,advising me of that Agency's proposal to separate me from service thirty days after my receipt of the letter.

This letter of proposed separation alleged that I had violated unspecified provisions of Administrative Memoranda Numbers 35 and 62; that upon my return to the United States for consultation I had transported four small diamonds of nominal value without Customs declaration. (These diamonds, however, were inspected by the Customs officials and it was determined that they need not be declared); and that I had disposed of custom-free provisions (time not specified) to Liberian Nationals in violation of 626.2 (a) and (b) of the Foreign Service Regulations. The letter further stated that the incidents reflecting on my ".....suitability for overseas assignment for the most part relate to the regulations controlling private business activities abroad and code of ethics," and that my activities reflected "poor judgment". (A copy of the letter is attached hereto as Exhibit 1) (Underscoring mine.)

Under date of March 28, 1955, I responded to Mr. Peterson's letter of March 25, 1955, and thereafter by letter dated April 8, 1955, Mr. Peterson wrote me stating: "The several instances of poor judgment on your part in Liberia are sufficient basis to render you unsuitable for further foreign assignment with this administration. Accordingly, you are notified that your separation will be effected at the close of

business on April 25, 1955, as originally proposed in my letter dated March 25, 1955." (Underscoring mine.)

Upon receipt of the letter of April 8, 1955, I requested a conference with the personnel officer to discuss the case and later requested a hearing by the Administrator. A Board was appointed to hear the case and a hearing was held on August 26, 1955, in Washington, D. C.

In the meantime, on May 9, 1955, I was informed that effective with the beginning of business on April 26, 1955, and pending final disposition of the case, I would be carried on leave without pay. Subsequent thereto the leave without pay was converted to annual leave, which status continued until June 28, 1955. Beginning June 29, 1955, I was again carried on leave without pay, which status was continued until August 28, 1955.

At the beginning of the hearing on August 26, 1955, I requested, through my attorneys, that I be specifically informed as to the charges against me so that I would know how to conduct my defense. I wanted to know what specific provisions of the Administrative Memoranda Numbers 35 and 62 I was being charged with having violated; whether I was being charged with the exercise of poor judgment or with violation of specific regulations, and whether I was being charged with having engaged in a prohibited business while in Liberia. The Board denied my request and ruled that I would have to defend against every possible violation of Administrative Memoranda Numbers 35 and 62 and that no more specific statement of the charges would be made.

The Board acted upon the advice of its counsel to the effect that since this was an Agency hearing no greater specificity of the charges was required.

After the hearing and on September 26, 1955, I received the following letter from the Director of the International Cooperation Administration, the successor to Foreign Operations Administration.

"INTERNATIONAL COOPERATION ADMINISTRATION

OFFICE OF THE DIRECTOR

Washington 25, D. C.

September 26 1955

"Mr. Scott C. Harshaw

654 Girard Street, N. W.

Apt. No. 214

Washington 1, D. C.

Dear Mr. Harshaw:

"This will serve to advise you of my decision respecting your separation from this Agency after due consideration to the recommendations made by the Appeal Board in your case.

"It is my decision that your withdrawal from the goreign service and termination were proper actions and that your separation from the service of this Agency should be complete effective thirty days from the date hereof, this thirty day period to be an extension of leave without pay.

"Yours very sincerely,

s/ John B. Hollister".

This letter does not state that the charges against me (whatever they may have been) were established; nor does it

state any reasons for my removal.

As a result of the failure of the Agency to make the charges against me specific I was handicapped in the presentation of my defense, and I am now without knowledge as to the reasons for my separation. There are more than a dozen specific prohibitions embodied in Administrative Memoranda Numbers 35 and 62. Which of them I was charged with having violated under section 1 of Mr. Peterson's letter of March 25, 1955, I did not know at the hearing and do not know now. I do not know whether my separation was for violating one or more of these provisions or whether it was for alleged "poor judgment", or for allegedly transporting four rough diamonds (for which the Customs officials found no violation of law), or for some other reasons. Neither am I informed as to whether my removal is for actions supposedly committed by me while working in Liberia or for those allegedly connected with my return from Liberia.

In view of the indefiniteness of the charges against me and inasmuch as the letter of September 26, 1955, is silent as to the disposition of those charges and states no reason for my removal, it is not established that the reason for my separation from International Cooperation Administration was for cause such as would reflect on my suitability for re-employment. It is also clear from the letters of March 25, 1955, and April 8, 1955 referred to above, that the charges against me (whatever they may have been) were limited solely to matters allegedly reflecting upon my "suitability for overseas assignment" with Foreign Operations Administration (later International Cooperation Administration). The determination made by International

Cooperation Administration of vague charges so limited has little if any relevance on the question of my suitability for re-employment with the Department of Health, Education and Welfare and the reliance by the Department upon such determination as being dispositive of my rights is clearly erroneous.

I appeal therefore, from the denial of my re-employment rights and request that I be granted a hearing. I desire to be represented in the case by Joseph C. Waddy and William C. Gardner, Attorneys, 615 "F" Street, Northwest, Washington, D. C.

Respectfully submitted,

Scott C. Harshaw

654 Girard Street, N. W.
Apartment 214
Washington, D. C.
February 7, 1956

The Commissioners
U. S. Civil Service Commission
Washington 25, D. C.

Gentlemen:

I do hereby appeal from the decision of E. A. Dunton, Chief, Appeals Examining Office, dated February 1, 1956, received by me February 2, 1956, denying jurisdiction to adjudicate an appeal from a denial of my reemployment rights by the Public Health Service, Department of Health, Education and Welfare.

On the question of jurisdiction I wish to point out that when I was transferred to the State Department, Foreign Service, I received Standard Form 50, "Notification of Personnel Action" from Federal Security Agency, Public Health Service,

stating the effective date of the action to be July 20, 1952, Civil Service or other legal authority to be "C6 Reg. 8.203" and further that:

> "This action is subject to all applicable laws, rules and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or cancelled if not in accordance with all requirements.
> "With reemployment rights in the U. S. Public Health Service."

The Appeals Examining Office apparently takes the position that this action of the Federal Security Agency was a nullity so far as Civil Service is concerned and that any rights I may have to re-employment must be governed by the Foreign Service Act, as amended, or the Mutual Security Act of 1851, as amended.

I contend that while the Foreign Service Act, as amended, and the Mutual Security Act of 1951, may have been the authority for the State Department to hire me and place me in foreign service, those Acts do not control the authority under which the Public Health Service released me, or may re-employ me, and, therefore, my re-employment rights are controlled by the applicable Civil Service Regulations rather than by those Acts. In this appeal I am not seeking any rights stemming from the Acts under which I was hired by the State Department. My claim is for rights which inured to me under Civil Service

Regulations in effect and becoming absolute at the time my separation and transfer were made by the Public Health Service.

The effect of the decision of the Appeals Examining Office is to deprive me of a hearing on the merits of my case and to leave me without any administrative remedy, although I have more than thirteen years as a career Civil Service employee and although my rights under Civil Service had become fixed by the action of the U. S. Public Health Service at the time it granted me re-employment rights.

I feel that my cause is a meritorious one and that the Civil Service Commission has jurisdiction under its statutory authority and regulations pursuant thereto to hear and determine my rights.

I therefore appeal to the Commissioners and request a hearing. I desire to be represented by Joseph C. Waddy and William C. Gardner, Attorneys, 615 "F" Street, Northwest, Washington, D. C.

Attached hereto is a copy of my letter of January 4, 1956, to the Appeals Examining Office.

Respectfully yours,

/s/ Scott C. Harshaw

Scott C. Harshaw

February 1, 1956

Mr. Scott C. Harshaw
654 Girard Street, N. W.
Apartment 214
Washington, D. C.

Dear Mr. Harshaw:

We regret to inform you that we are unable to accept

your appeal from a denial of your reemployment rights by the Department of Health, Education and Welfare.

A review of your personnel file revealed that you transferred from the Public Health Service on July 20, 1952 to the State Department. It was indicated at that time that you transferred with reemployment rights. The record also disclosed that you entered on duty with the State Department under an indefinite appointment on July 21, 1952 as an FSS-6. The authority for this appointment was Public Law 165, 82nd Congress and Public Law 724, 79th Congress.

These statutes and amendments thereto contain the provisions for granting reemployment rights; however, the Civil Service Commission was not charged with the administration of these laws. Therefore, we have no jurisdiction to adjudicate a reemployment rights appeal stemming from the Foreign Service Act, as amended, or the Mutual Security Act of 1951, as amended.

No further appeal from this decision will be entertained unless it is submitted to the Commissioners, U. S. Civil Service Commission, Washington 25, D. C., within seven (7) days after receipt of this decision. Additional representations should be made in writing and submitted in duplicate with the appeal of the Commissioners.

Sincerely yours,

E. A. Dunton, Chief

Appeals Examining Office

654 Girard Street, N. W.
Apartment 214
Washington, D. C.
January 3, 1956

Appeals Examining Office of the
United States Civil Service Commission
Washington 25, D. C.

Gentlemen:

This is an appeal from a denial of my re-employment rights by the Public Health Service, Department of Health, Education and Welfare.

I am a Civil Service career employee and have been such for more than thirteen years. On July 20, 1952, while I was employed by the Federal Security Agency in a Civil Service job as Superintendent of Buildings and Grounds at Freedmen's Hospital, Washington, D. C., I was appointed by the Department of State to a position with the Technical Cooperation Administration as Maintenance engineer, initial post, Monrovia, Liberia. I gave up my job at Freedmen's Hospital and entered upon my duties in Liberia. Later the functions and personnel of the Technical Cooperation Administration were transferred to the Foreign Operations Administration and thereafter to the International Cooperation Administration. When I was appointed to the position with the Technical Cooperation Administration I was given re-employment rights with the Federal Security Agency. I was involuntarily separated from International Cooperation Administration effective October 26, 1955. By letter dated November 19, 1955, I requested re-employment in the Public Health Service, Department of Health, Education and Welfare. Under the date of December 20, 1955, I was informed by Paul M. Camp, Chief, Division of Personnel, that since my removal from my last Federal position was for cause, I do not meet the criteria for exercising my re-employment rights and, therefore, I would

not be restored to duty in the Public Health Service. I hereby appeal from that decision.

I contend: (1) that it is impossible to determine from the charges against me or the notice advising me of my separation the cause for which I was separated from International Cooperation Administration, and (2) whatever the cause might be, it does not reflect adversely on my suitability for re-employment with the Department of Health, Education and Welfare.

In support of my contentions I state the following: On or about December 20, 1954, I was given two days notice by my superiors in Monrovia that I was being returned to the United States for consultation and that I would be required to leave Liberia on December 22, 1954. I was also ordered to pack and secure all of my property before leaving. I arrived in the United States December 24, 1954, and thereafter discovered that I was under investigation concerning a number of charges against me. I was given no written list of the charges at that time but was required to make statements and submit to interrogation. Approximately three months after my return to the United States I received a letter dated March 25, 1955, from R. E. Peterson, Director of Personnel, Foreign Operations Administration, advising me of that Agency's proposal to separate me from service thirty days after my receipt of the letter.

This letter of proposed separation alleged that I had violated unspecified provisions of Administrative Memoranda Numbers 35 and 62; that upon my return to the United States

for consultation I had transported four small diamonds of nominal value without Customs declaration. (These diamonds, however, were inspected by the Customs officials and it was determined that they need not be declared); and that I had disposed of custom-free provisions (time not specified) to Liberian Nationals in violation of 626.2 (a) and (b) of the Foreign Service Regulations. The letter further stated that the incidents reflecting on my "....._suitability for overseas assignment for the most part_ relate to the regulations controlling private business activities abroad and code of ethics," and that my activities reflected "poor judgment". (A copy of the letter is attached hereto as Exhibit 1) (Underscoring mine.)

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In the meantime, on May 9, 1955, I was informed that effective with the beginning of business on April 26, 1955, and pending final disposition of the case, I would be carried on leave without pay. Subsequent thereto the leave without pay was converted to annual leave, which status continued until June 28, 1955. Beginning June 29, 1955, I was again carried on leave without pay, which status was continued until August 28, 1955.

At the beginning of the hearing on August 26, 1955, I requested, through my attorneys, that I be specifically informed as to the charges against me so that I would know how to conduct my defense. I wanted to know what specific provisions of the Administrative Memoranda Numbers 35 and 62 I was being charged with having violated; whether I was being charged with the exercise of poor judgment or with violation of specific regulations, and whether I was being charged with having engaged in a prohibited business while in Liberia. The Board denied my request and rules that I would have to defend against every possible violation of Administrative Memoranda Numbers 35 and 62 and that no more specific statement of the charges would be made. The Board acted upon the advice of its counsel to the effect that since this was an Agency hearing no greater specificity of the charges was required.

After the hearing and on September 26, 1955, I received the following letter from the Director of the International Cooperation Administration, the successor to Foreign Operations Administration:

"INTERNATIONAL COOPERATION ADMINISTRATION
OFFICE OF THE DIRECTOR
Washington 25, D. C.

Sep. 26 1955

"Mr. Scott C. Harshaw
654 Girard Street, N. W.
Apt. No. 214
Washington 1, D. C.

"Dear Mr. Harshaw:

"This will serve to advise you of my decision respecting your separation from this Agency after due consideration to the recommendations made by the Appeal Board in your case.

"It is my decision that your withdrawl from the foreign service and termination were proper actions and that your separation from the service of this Agency should be complete effective thirty days from the date hereof, this thirty day period to be an extension of leave without pay.

"Yours very sincerely,

/s/ John B. Hollister".

This letter does not state that the charges against me (whatever they may have been) were established; nor does it state any reasons for my removal.

As a result of the failure of the Agency to make the charges against me specific I was handicapped in the presentation of my defense, and I am now without knowledge as to the reasons for my separation. There are more than a dozen specific prohibitions embodied in Administrative Memoranda 35 and 62. Which of them I was charged with having violated under section 1 of Mr. Peterson's letter of March 25, 1955, I did not know at the hearing and do not know now. I do not know whether my separation

was for violating one or more of these provisions or whether it was for alleged "poor judgment", or for allegedly transporting four rough diamonds (for which the Customs officials found no violation of law), or for some other reasons. Neither am I informed as to whether my removal is for actions supposedly committed by me while working in Liberia or for those allegedly connected with my return from Liberia.

In view of the indefiniteness of the charges against me and inasmuch as the letter of September 26, 1955, is silent as to the disposition of those charges and states no reason for my removal, it is not established that the reason for my separation from International Cooperation Administration was for cause such as would reflect on my suitability for re-employment. It is also clear from the letters of March 25, 1955, and April 8, 1955, referred to above, that the charges against me (whatever they may have been) were limited solely to matters allegedly reflecting upon my "suitability for overseas assignment" with Foreign Operations Administration (later International Cooperation Administration. The determination made by International Cooperation Administration of vague charges so limited has little if any relevance on the question of my suitability for re-employment with the Department of Health, Education and Welfare and the reliance by the Department upon such determination as being dispositive of my rights is clearly erroneous.

I appeal therefore, from the denial of my re-employment rights and request that I be granted a hearing. I desire to be represented in the case by Joseph C. Waddy and William C.

Gardner, Attorneys, 615 "F" Street, Northwest, Washington, D. C.

Respectfully submitted,

/s/ Scott C. Harshaw

Scott C. Harshaw

CERTIFICATE OF SERVICE

A copy of the foregoing Brief was delivered by hand this 23rd day of July, 1963, to the Office of the United States Attorney for the District of Columbia, located in the United States Courthouse, 3rd and Pennsylvania Avenue, N. W., Washington, D. C.

A. J. Spero

I hereby certify that a copy of this typewritten brief has been placed in the hands of the printer this 23rd day of July, 1963, and that no changes in the brief to be filed in printed form will be made, except for minor changes or corrections.

A. J. Spero

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

515

No. 17742

SCOTT C. HARSHAW, APPELLANT

v.

DR. LUTHER PERRY, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
SYLVIA BACON,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Is appellant's claim barred by laches where 3 years and 11 months elapsed between the final decision of the Civil Service Commission and apellant's suit in the District Court?

2. Is appellant's claim barred by actual litigation of, or opportunity to litigate, the issues involved herein in *Harshaw* v. *Hollister*, C.A. 2408–56, App. No. 14,600, 105 U.S. App. D.C. 144, 265 F.2d 128 (1959)?

3. Is appellant entitled to reemployment with the Public Health Service under Civil Service Regulation 10.105 (formerly 8.206) after involuntary separation for cause from the International Cooperation Administration?

4. Is appellant's involuntary separation from government employment for unsatisfactory performance of duty and misconduct or malfeasance pursuant to Section 651 and 652, Foreign Service Act of 1946, 60 Stat. 699, 1017, 22 U.S.C.A. 1021 and 1022 and applicable regulations (failure to conform to published guides for conduct, poor judgment and interest in outside business activities in diamonds in Liberia in violation of regulations in a situation potentially embarrassing to the United States) a separation for such cause as would reflect on appellant's suitability for reemployment?

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TABLE OF CASES

OTHER REFERENCES

*Denotes cases chiefly relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17742

SCOTT C. HARSHAW, APPELLANT

v.

DR. LUTHER PERRY, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

PROCEEDINGS BELOW

On February 11, 1960, appellant filed suit in the United States District Court for the District of Columbia. He sought a declaration of reemployment rights, reemployment in the Public Health Service, back pay and other relief (J.A. 1–6).

An order denying appellant's motion for summary judgment, granting appellees' cross-motion for summary judgment and dismissing the complaint was entered on December 18, 1962 (J.A. 20). Appeal was noted on January 16, 1963.

COUNTERSTATEMENT OF FACTS

Appellant was a non-veteran, permanent civil service employee. On July 20, 1952, he transferred from a Public Health Service position to a Department of State position with reemployment rights in the Public Health Service (J.A. 33).

On September 26, 1966 appellant was involuntarily separated from employment with the International Cooperation Administration. Separation was made pursuant to Sections 651 and 652, Foreign Service Act of 1946, 60 Stat. 699, 1017, 22 U.S.C.A.

1021 and 1022 and applicable regulations relating to unsatisfactory performance of duty and misconduct or malfeasance. Specifically, appellant was found to be actively interested in the diamond business in Liberia in violation of regulations in circumstances which were potentially embarrassing to the United States. He also failed to obtain an export license for diamonds, failed to declare diamonds upon return to the United States, exercised poor judgment and failed to conform to published guides for conduct of employees (J.A. 13–18).

After his separation from ICA and before filing his first suit, appellant sought reemployment with the Public Health Service. Reemployment was denied on December 20, 1955 on the ground that his separation from ICA was for cause based on charges which made him ineligible for reemployment under Civil Service Regulation 10.105 (J.A. 30–31). Appellant appealed the denial of reemployment to the Civil Service Commission and the denial was affirmed by a final decision of the Commission on March 13, 1956 (J.A. 28–29).

On June 8, 1956, nearly three months after final denial of reemployment, appellant filed a suit captioned *Harshaw* v. *Hollister*, C.A. 2408–56 seeking to set aside his separation and asking restoration "to his employment and position effective October 26, 1955" and other relief. He complained in paragraph 21 that he had been denied reemployment in the Department of Health, Education and Welfare (Supp. App. 16).[1] The suit was determined on motion for summary judgment on June 17, 1958. This Court reviewed the decision and found that the separation was not arbitrary or illegal and affirmed the discharge. The question of reemployment rights was not discussed (Supp. App. 17 and *Harshaw* v. *Hollister*, 105 U.S. App. D.C. 144, 265 F. 2d 128 (1959)).

On June 17, 1959 appellant "resubmitted" his request for reemployment with the Public Health Service (J.A. 28). Appellant was again advised that his separation was for cause and that he did not meet the criteria for reemployment established by Civil Service Regulation 10.105 (J.A. 27 and 34).

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[1] Denotes Appendix to Appellees' Brief beginning p. 10, *infra*, hereinafter Supp. App.

The instant suit was filed on February 11, 1960, three years and eleven months after the final decision of the Civil Service Commission denying reemployment rights on March 13, 1956 (J.A. 1 and 35–36).

STATUTES AND REGULATIONS

Act of March 3, 1871, as amended 5 U.S.C. 631 provides:

> *Regulation of admissions to civil service.* The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

Executive Order No. 10577, November 22, 1954, 19 F.R. 7521, 5 U.S.C.A. 631 (Supp. Pam. 1951–1961) provides:

> SEC. 7.3 *Reemployment rights.* The Commission, whenever it determines it to be necessary, shall prescribe regulations governing the release of employees (both within the competitive service and the excepted service) by any agency in the executive branch of the Government for employment in any other agency, and governing the establishment, granting, and exercise of rights to reemployment in the agencies from which employees are released.

5 CFR 10.105 and 10.106 (1955 Supp.), 19 F.R. 8616, December 16, 1954, formerly 5 CFR 8.206, 17 F.R. 344, January 11, 1952 (revised and superceded 21 F.R. 5027, July 7, 1956) provides:

> SEC. 10.105 *Conditions under which employees may apply for reemployment.*
>
> (a) An employee shall be entitled to reemployment by the original agency in which he was granted reemployment rights when:

(1) He is involuntarily separated without cause such as would reflect on his suitability for reemployment; or

(2) He is reduced to a grade or level below his latest grade or level in his original agency.

SEC. 10.106 *Appeals to the Commission.* Any employee with reemployment rights who has been denied reemployment may appeal to the Commission. Final decision of his right to reemployment shall be made by the Commission.

SUMMARY OF ARGUMENT

I

Appellant's claim is barred by laches. Three years and eleven months elapsed between final administrative denial of reemployment and the instant suit. The delay prejudiced the government. Resubmission of the request for reemployment in 1959 does not make this action timely.

II

In a prior litigation, *Harshaw* v. *Hollister*, C.A. 2408–56, appellant did litigate or should have litigated the questions he now puts before the Court. He is collaterally estopped from relitigating the question of cause for separation. He should not be permitted to split causes of action involving the same factual questions.

III

Appellant was properly denied reemployment in the Public Health Service. He was separated from the International Cooperation Administration on charges which constitute such cause for separation as would reflect on his suitability for reemployment. The denial of reemployment was in accord with the applicable regulations. On its merits it was reasonable. It was a proper exercise of agency discretion in determining suitability for employment. There is no basis for Court intervention to set aside this administrative decision.

ARGUMENT

I. Appellant's claim is barred by laches.

The doctrine of laches requires affirmance of the judgment of the District Court. Government employees who claim violation of their employment rights must act diligently. Failure to bring suit promptly requires dismissal of the action. *United States ex rel. Arant* v. *Lane*, 249 U.S. 367, 372 (1919).

In the present case appellant waited 3 years and 11 months before bringing suit. He requested reemployment in November of 1955. He completed his appeals to the highest administrative authority on March 13, 1956. He had no further right of administrative appeal. 5 CFR 10.106 (1955 Supp.), 19 F.R. 8616, December 16, 1954. However, not until February 11, 1960 did he file this action to review the denial of reemployment.

The delay was unreasonable. It plainly prejudiced the government and falls within the principles most recently applied by this Court in *Zuckert* v. *Peterson*, D.C. Cir. 17,560, June 13, 1963; *Nicholas* v. *United States*, 257 U.S. 71 (1921) (3 year delay); *Norris* v. *United States*, 257 U.S. 77 (1921) (11 month delay); *Zahner* v. *Benson*, 110 U.S. App. D.C. 90, 289 F. 2d 756 (1960) (1 year delay); *Jones* v. *Summerfield*, 105 U.S. App. D.C. 140, 265 F. 2d 124 (1959), *cert. denied*, 361 U.S. 841; *Grasse* v. *Snyder*, 89 U.S. App. D.C. 352, 192 F.2d 35, 38 (1951) (16 months delay); *Caswell* v. *Morgenthau*, 69 U.S. App. D.C. 15, 98 F. 2d 296 (1938), *cert. denied*, 305 U.S. 596 (18 months delay).

Appellant cannot avoid the doctrine of laches by resubmission of his request for reemployment. Letter writing after final administrative action does not keep the matter current. It does not excuse delay in pursuing judicial remedies. *Bailey* v. *United States*, 171 F. Supp. 281, 283 (Ct. Cl. 1959) and *Elchibegoff* v. *Dulles*, 123 F. Supp. 831, 832, (D.C.D.C. 1954), *affirmed*, 95 U.S. App. D.C. 362, 222 F. 2d 53, *cert. denied*, 345 U.S. 943.

699-002—63——2

II. Appellant's claim is barred by *Harshaw* v. *Hollister*, C.A. 2408–56.

Dismissal of the complaint below was proper because in a prior litigation appellant did litigate or should have litigated the questions which he now presents. He is estopped from further litigation of those questions.

In the present case and in *Harshaw* v. *Hollister*, C.A. 2408–56, there is an identical issue. Each case deals with the question of whether there was cause for appellant's separation. In the first case, it is raised by an allegation of arbitrary and capricous action. In the second case it is raised by an allegation of improper denial of reemployment rights. In each case, however, the essential facts are the same and the evidence is identical. Further the plaintiff is the same in each case and the defendant in each case is an official of the United States. The decision in the first litigation, *Harshaw* v. *Hollister*, 105 U.S. App. D.C. 144, 265 F.2d 128 (1959), should therefore be conclusive on cause for separation. RESTATEMENT OF JUDGMENTS § 68.1; "Developments—Res Judicata," 65 Harv. L. R. 818, 869–874, 881–882 (1954).

In the prior litigation appellant could have litigated the denial of his reemployment rights. He filed his action nearly 3 months after denial of the rights; he noted the denial in his first complaint and he sought broad relief. However, the record does not reflect actual determination of the issue or joinder of the reemploying agency as a defendant. None the less the same principles of substantive and procedural law apply to the separation claim and the reemployment claim. The same alleged wrong is basis to both claims. The operative facts and the evidence are the same. Claims involving the same factual issues should be pleaded as one cause of action. Appellant should not be allowed piecemeal litigation. RESTATEMENT OF JUDGMENTS § 62 (1942).

III. Appellant was properly denied reemployment.

The District Court was correct in affirming the denial of reemployment. There was no procedural error in the denial of employment and suitability for government employment is largely a matter for agency discretion. By analogy to the employee

discharge cases, the court should not substitute its judgment for the judgment of the agency in reemployment matters. *Woodrow Studemeyer* v. *Macy*, D.C. Cir. No. 17,465, June 26, 1963 and *Carter* v. *Forrestal*, 85 U.S. App. D.C. 53, 54, 175 F. 2d 364, 365, *cert. denied*, 338 U.S. 832 (1949).

In the present case the reemploying agency, the Public Health Service, received appellant's application and ascertained that he was not eligible for reemployment. The pertinent regulation provides:

> SEC. 10.105 *Conditions under which employees may apply for reemployment.*
>
> (a) An employee shall be entitled to reemployment by the original agency in which he was granted reemployment rights when:
>
> (1) He is involuntarily separated without cause such as would reflect on his suitability for reemployment; or
>
> (2) He is reduced to a grade or level below his latest grade or level in his original agency.

5 CFR 10.105 (1955 Supp.), 19 F.R. 8616, December 16, 1954, formerly 8.206, 17 F.R. 344, January 11, 1952. The reemploying agency found that appellant had been separated from ICA for cause based on charges. These charges reflected on his suitability for reemployment. He was, therefore, ineligible for reemployment.

Under the applicable regulations, reemployment questions are addressed to the reemployment agency in the first instance. No regulation requires that the reemploying agency hold a hearing to determine what constitutes cause reflecting on suitability for reemployment. Such a hearing would duplicate the separation hearings. Further no regulation makes the "feeling" of the discharging agency binding on the reemploying agency.

Final review of reemployment questions lies with the Civil Service Commission. In this case the Commission reviewed the denial of reemployment to appellant and found:

> A review of all the representations made by you and consideration of all the evidence contained in the file concerning your case shows that you do not meet the requirements of Civil Service Regulation 10.105, for-

> merly 8.206, and that you are not entitled to re-employment with the Public Health Service, Department of Health, Education and Welfare. The Chief, Division of Personnel of the Health Service was correct in informing you that your separation from the International Cooperation Administration for cause constituted sufficient basis for denial of your request for re-employment.

The facts support these decisions. The facts show (1) involuntary separation (2) for cause (3) which reflects on suitability for reemployment.

Appellant when in the employ of the International Cooperation Administration did not conform to the published guides and policies for conduct of employees, showed poor judgment in certain actions and maintained an active interest in the diamond business thereby creating a situation potentially embarrassing to the United States. Further he was tactless in his relations with administrative superiors creating a circumstance in which his usefulness to the Mission was questionable. These acts were cause for involuntary separation and this Court so determined when it found that appellant's separation was in no way arbitrary or illegal. *Harshaw* v. *Hollister, supra,* p. 6.

The above-described failures reflect on appellant's suitability for reemployment. Failure to follow instructions, poor judgment and a tactlessness which renders an employee useless are serious defects in the employee either at home or abroad.

In these circumstances the administrative determination that appellant is not entitled to reemployment should not be disturbed. The decision was procedurally proper and was not arbitrary or capricious. It should therefore be affirmed. *Dew* v. *Halaby,* —— U.S. App. D.C. ——, 317 F. 2d 582 (1963) citing *Keim* v. *United States,* 177 U.S. 290, 296 (1900) and *Hargett* v. *Summerfield,* 100 U.S. App. D.C. 85, 88, 243 F. 2d 29, 32 (1957).

CONCLUSION

Wherefore it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
SYLVIA BACON,
Assistant United States Attorneys.

APPENDIX

INDEX

United States District Court for the District of Columbia

Filed June 8, 1956

Civil Action No. 2408–56

SCOTT G. HARSHAW, 654 GIRARD STREET, NORTHWEST WASHINGTON, D.C., PLAINTIFF

v.

JOHN B. HOLLISTER, DIRECTOR OF INTERNATIONAL COOPERATION ADMINISTRATION, WASHINGTON, D.C., DEFENDANT

COMPLAINT FOR DECLARATORY JUDGMENT, RESTORATION OF JOB, AND OTHER RELIEF

1. This is a civil action for equitable relief and for declaratory judgment arising under the laws of the United States. The amount in controversy exceeds $3,000.00 exclusive of interest and costs.

2. Jurisdiction of this Court is invoked under United States Code, Title 28, Sections 1331 and 2201 and District of Columbia Code, Section 11–305, and 11–306.

3. Plaintiff is a citizen of the United States and is a resident of the District of Columbia.

4. Defendant is the duly appointed, acting and qualified Director of the International Cooperation Administration, an agency in the United States Department of State, and is sued in that capacity only.

5. Effective July 21, 1952, plaintiff was employed by the said Department of State as a Foreign Service Staff Officer of class 6 at a salary of $6,501.00 per year, pursuant to the Foreign Service Act of 1946 (60 Stat. 999; 22 U.S.C. § 801 et.

seq.). The previous day, July 20, 1952, plaintiff had been separated from employment with the United States Federal Security Agency in order that he might transfer to the State Department. At the time of the separation, plaintiff was granted re-employment rights with the United States Federal Security Agency.

6. Shortly thereafter plaintiff was assigned to duty at the U.S.A. Operation Mission, Monrovia, Liberia, as maintenance engineer. Subsequently, the functions of this position were transferred to the Foreign Operations Administration (hereinafter referred to as F.O.A.) and, in connection therewith, plaintiff was transferred to said F.O.A.—his duties, post, class and salary unchanged. F.O.A. was an agency of the United States.

7. On December 20, 1954, plaintiff was informed by his superiors in Monrovia that he was being returned to the United States on December 22, 1954, for consultation. He was ordered to pack and secure all of his property before leaving. Plaintiff arrived in the United States on December 24, 1954, and thereafter was informed that he was under agency investigation concerning certain charges which had been placed against him. Plaintiff was not thereafter returned to his post in Monrovia. He was not given, at that time, any formal statement of the charges, but was required to submit to questioning by agency officials and to give them statements. Finally, on March 25, 1955, plaintiff received written notice from F.O.A. that it was proposed that he be separated from employment by F.O.A. effective 30 days thereafter. A copy of said notice is appended hereto as "Exhibit A".

8. The reason for separation set forth in said notice was that plaintiff had violated Foreign Service regulations as set forth in I Foreign Service Manual, Part IV, 626.1 and 626.2 Copies of these portions of the Foreign Service Manual are appended hereto as "Exhibit B."

9. The conduct of plaintiff alleged in said notice as being violative of these regulations was:

(a) Making private arrangements in anticipation of personal profit by qualifying to engage in outside business activities, while an F.O.A. employee in Liberia; such activities allegedly being in violation of F.O.A. Administrative Memoranda Nos.

35 and 62. Copies of these memoranda are appended hereto as "Exhibit C".

(b) Transporting four rough diamonds of nominal value from Liberia to the United States on home leave, back to Liberia on his return to duty there, and then again to the United States upon return here for consultations which were preliminary to his removal—all without payment of Liberian export duty and allegedly in violation of U.S. Custom regulations.

(c) Disposing of custom-free provisions to Liberian Nationals while preparing to depart for the United States upon extremely short notice—in violation of said F.O.A. Administrative Memorandum No. 62, specifically sections 626.21 (a) and (b).

10. Said notice of proposal of separation informed plaintiff that he might submit a written statement of explanation within five days and that after such statement had been thoroughly considered he would be advised of the agency decision.

11. On April 8, 1955, plaintiff received written notice from F.O.A. that plaintiff's written reply to said charges, submitted by him on March 28, 1955, had been thoroughly considered; that several instances of poor judgment on his part were sufficient basis to render him unsuitable for further foreign assignments with that agency and that his separation would be effected at the close of business on April 25, 1955. He was informed further that F.O.A. employees might appeal in writing separation actions of this type to the Director of F.O.A. within five days. A copy of this notice is appended hereto as "Exhibit D".

12. Plaintiff did submit an appeal and a hearing was held thereon on August 26, 1955, by a Board of three hearing officers.

13. Prior to this hearing of August 26, 1955, to wit on June 30, 1955, F.O.A. was abolished and its functions, offices, records, property, personnel and positions, with certain exceptions not herein material, were transferred to the Department of State, pursuant to Executive Order 10610 (20 F.R. 3179). Accordingly, on July 1, 1955, plaintiff was transferred from F.O.A. to the International Cooperation Administration (hereinafter referred to as I.C.A.) an agency in the Department of State, in

class FSS–6, and at a salary of $7,380.00 per year. By the terms of said Executive Order 10610, I.C.A. and its Director had been made the successors of F.O.A. and the Director thereof, respectively.

14. The three hearing officers who heard the plaintiff's appeal on August 26, 1955, were employees of I.C.A. who had been selected and designated for that purpose by the Director of I.C.A. Plaintiff was advised by the office of the General Counsel of I.C.A., in reply to his inquiry with respect thereto, that there were in existence no general regulations applicable to his separation proceeding and that the agency was conducting such proceeding on an ad hoc basis. In its aforementioned notification of charges dated March 25, 1955, F.O.A. had informed plaintiff that F.O.A. Manual Order 460.3, which prescribed rules for the guidance of F.O.A. employees with respect to conflicts of interests and private business activities of F.O.A. employees, was not applicable. This Manual Order also prescribed the procedure to be followed in actions for the separation of F.O.A. employees charged with violations of those rules.

15. At the outset of the hearing, plaintiff, through his attorneys, pointed out to the hearing Board that inasmuch as his notification of proposed separation had charged him with violations of the provisions of F.O.A. Administrative Memoranda Nos. 35 and 62, which Memoranda embody numerous Foreign Service Regulations embracing activities of various and diverse natures, and that, inasmuch as the F.O.A. letter of April 8, 1955, notifying him of his discharge had stated that the agency was relying upon plaintiff's poor judgment as the basis for its discharge action, the charges were so broad and sweeping as to be too vague to afford plaintiff a fair chance to defend himself. Plaintiff then requested the hearing Board to inform him whether he was being charged with exercising poor judgment or with the violation of regulations embodied in said Memoranda Nos. 35 and 62, and, if the latter, to specify the regulations. Upon advice of agency counsel, then and there present, to the effect that no greater specificity of the charges was required for an agency hearing, the Board denied plaintiff's request.

16. At the hearing, no witnesses were called by the Board against plaintiff; no Foreign Service Regulations or agency regulations were introduced against him and no custom laws or regulations of the United States or Liberia were offered against him.

17. On September 26, 1955, plaintiff was notified by the Director of I.C.A. that after due consideration he had reached the decision that plaintiff's "withdrawal from the foreign service and termination were proper actions" and that plaintiff would be separated effective thirty days thereafter. (A copy of this notice is appended hereto as "Exhibit E"). Accordingly, plaintiff was discharged from I.C.A. on October 26, 1955. The legal authority relied upon by said agency in effecting this discharge was Section 527 (c)(2) of the Mutual Security Act of 1954 (60 Stat. 833, 22 U.S.C. § 1751 et. seq.), which section provides as follows:

> SEC. 527 EMPLOYMENT OF PERSONNEL—
>
> * * * * *
>
> (c) For the purpose of performing functions under this Act outside the continental limits of the United States, the Director may—
>
> * * * * *
>
> (2) utilize such authority, including authority to appoint and assign personnel for the duration of operations under this Act, contained in the Foreign Service Act of 1946, as amended (22 U.S.C. § 801), as the President deems necessary to carry out functions under this Act. Such provisions of the Foreign Service Act as the President deems appropriate shall apply to personnel appointed or assigned under this paragraph, including, in all cases, the provisions of sections 443 and 528 of that Act.

18. The above-quoted section 527 (e)(2) is expressly implemented by Executive Order 10575, 19 F.R. 7249. Under this Executive Order 10575 and the authority to which it, by its terms, expressly refers, the Director of I.C.A. is authorized to exercise with respect to Foreign Service Staff Officers and employees that authority which is available to the Secretary

of State under the Foreign Service Act 1946, 60 Stat. 999, 22 U.S.C. § 801 et seq. The only provisions of that Act which authorize the separation of Foreign Service Staff Officers and employees for cause are as follows:

> PART F—SEPARATION OF STAFF OFFICERS AND EMPLOYEES FOR UNSATISFACTORY PERFORMANCE OF DUTY
>
> SEC. 651. The Secretary may, under such regulations as he may prescribe, separate from the Service any staff officer or employee on account of the unsatisfactory performance of his duties, but no such officer or employee shall be so separated from the Service until he *shall have been granted a hearing* by the Board of the Foreign Service and the *unsatisfactory performance of his duties shall have been established at such hearing*. [Italic ours.]
>
> FOR MISCONDUCT OR MALFEASANCE
>
> SEC. 652. The Secretary shall separate from the Service any staff officer or employee who shall be guilty of misconduct or malfeasance in office, but no such officer or employee shall be so separated from the Service until he shall have been *granted a hearing* by the Board of the Foreign Service *and his misconduct or malfeasance shall have been established at such hearing*. [Italic ours.]

19. Administrative regulations governing the procedure to be followed in effecting plaintiff's separation under sections 651 and 652 of the Foreign Service Act of 1946, and also requiring that the employee's unsatisfactory performance of duty, malfeasance, and/or misconduct, as the case may be, be established at a hearing and that the employee be notified thereupon, are set forth in the Foreign Service Manual (I FSM IV 760–764, 63; a copy of which is appended hereto as "Exhibit F"). Said regulations are Department of State regulations pertaining to Foreign Service personnel and are of general applicability.

20. Defendant's action in separating plaintiff from his employment was illegal, arbitrary and capricious and in violation of the aforesaid statutes and regulations. Neither before the hearing nor at the hearing were the charges against plaintiff made sufficiently precise and specific as to give to plaintiff a

fair change to defend himself or to afford him a hearing within the meaning of the applicable statutes and regulations. There was no finding that unsatisfactory performance of duty, malfeasance, and/or misconduct had been established at the hearing, although such finding is required by the statutes and regulations. The defendant's adverse decision contained only a conclusion that plaintiff's "Withdrawal from the Foreign service and termination were proper actions" and did not purport to reflect that unsatisfactory performance of duty, malfeasance and misconduct, or either of them, had been established at a hearing; nor did said decision disclose which, if any, of the charges had been established and was being relied upon to justify plaintiff's discharge.

21. As a result of defendant's aforesaid illegal conduct plaintiff has been deprived of his employment; has been reduced to an unofficial status of "unemployable" with respect to further employment by the United States Government; has been denied reemployment by the Department of Health, Education and Welfare, the successor to the United States Federal Security Agency, and has lost in excess of $4,000.00 in salary.

22. Plaintiff has exhausted his administrative remedies. On November 4, 1955, plaintiff appealed his removal to the Appeals Examining Office of the United States Civil Service Commission which office declined to review the case on the ground of lack of jurisdiction, positions of Foreign Service Staff Officers being exempt from the operation of the Civil Service Rules and Regulations. Upon further appeal, this refusal to review was upheld by the Commission's Board of Appeals and Review on March 28, 1956.

WHEREFORE, plaintiff prays:

1. For a judgment declaring defendant's action in effecting plaintiff's removal to be in violation of the aforementioned statutes and regulations of the United States.

2. For a judgment setting aside plaintiff's removal as being illegal, void and of no effect.

3. For a mandatory injunction ordering the defendant to restore plaintiff to his employment and position, effective October 26, 1955.

4. For a judgment for accumulated salary and compensation from the date of illegal removal until reinstatement.

5. For such other and further relief as to the Court may seem just and proper.

JOSEPH E. WADDY,
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WILLIAM C. GARDNER,
615 "F" Street NW., Washington 4, D.C.,
Attorneys for Plaintiff.

United States District Court for the District of Columbia

Civil Action No. 2408–56

SCOTT C. HARSHAW, PLAINTIFF

v.

JOHN B. HOLLISTER, DEFENDANT

ORDER

This cause having come on for hearing on defendant's Motion for Summary Judgment and plaintiff's Cross-Motion for Summary Judgment, and the Court having considered the pleadings, motions, exhibits, and affidavits on file herein, and it appearing to the Court that there is no issue as to any material fact, that the charges against plaintiff were sufficiently specific, and that the actions of the agency in removing plaintiff from Federal Service were in substantial compliance with the applicable statutes and regulations, it is by the Court this 17th day of June, 1958.

ORDERED that defendant's Motion for Summary Judgment be, and it is hereby, granted and that plaintiff's Cross-Motion for Summary Judgment be, and it is hereby, denied.

/s/ EDWARD M. CURRAN,
United States District Judge.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Order was made upon plaintiff by mailing a copy thereof to his attorneys, Waddy and Gardner, Esquires, 615 F Street, NW., Washington, D.C., this 17th day of June, 1958.

/s/ FRANCIS L. YOUNG, JR.,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1958